

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

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**AFFYMETRIX, INC.**, a Delaware corporation,

Plaintiff/Counter-Defendant,

v.

**ILLUMINA, INC.**, a Delaware corporation,

Defendant/Counter-Plaintiff.

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Civil Action No.: 04-901 JJF

**ILLUMINA, INC.'S PROPOSED VERDICT FORM**

Illumina, Inc. submits the attached Proposed Verdict Form, in triplicate. Illumina will submit a disk that contains its Proposed Verdict Form in WordPerfect format at a time that is convenient for the Court.

/s/ Richard K. Herrmann

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**PATENT ISSUES**

**U.S. PATENT NO. 5,795,716 (“THE ‘716 PATENT”)**

**Infringement of the ‘716 Patent**

1. Has Affymetrix proven by a preponderance of the evidence that Illumina has literally infringed any of the following claims of the ‘716 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

2. Has Affymetrix proven by a preponderance of the evidence that Illumina has infringed any of the following claims of the ‘716 patent under the doctrine of equivalents?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

3. Has Affymetrix proven by a preponderance of the evidence that Illumina has contributorily infringed any of the following claims of the ‘716 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

4. Has Affymetrix proven by a preponderance of the evidence that Illumina has induced infringement of any of the following claims of the ‘716 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

5. If you found that Illumina infringes any claim of the ‘716 patent, state separately for each claim the specific Illumina products and services you find to infringe:

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**Invalidity and Unenforceability of the ‘716 Patent**

6. Has Illumina proven by clear and convincing evidence that any of the following claims of the ‘716 patent are invalid as anticipated?

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

7. Has Illumina proven by clear and convincing evidence that any of the following claims of the '716 patent are invalid as obvious?

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

8. Has Illumina proven by clear and convincing evidence that any of the following claims of the '716 patent are invalid for lack of an adequate written description?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

9. Has Illumina proven by clear and convincing evidence that any of the following claims of the '716 patent are invalid for lack of enablement?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

10. Has Illumina proven by clear and convincing evidence that any of the following claims of the '716 patent are invalid as indefinite?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

11. Has Illumina proven by clear and convincing evidence that the '716 patent is unenforceable for inequitable conduct?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**U.S. PATENT NO. 6,646,243 (“THE ‘243 PATENT”)**

**Infringement of the ‘243 Patent**

12. Has Affymetrix proven by a preponderance of the evidence that Illumina has literally infringed any of the following claims of the ‘243 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

13. Has Affymetrix proven by a preponderance of the evidence that Illumina has infringed any of the following claims of the ‘243 patent under the doctrine of equivalents?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

14. Has Affymetrix proven by a preponderance of the evidence that Illumina has contributorily infringed any of the following claims of the ‘243 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

15. Has Affymetrix proven by a preponderance of the evidence that Illumina has induced infringement of any of the following claims of the ‘243 patent?

Claim Y      Yes \_\_\_\_\_ (for Affymetrix)    No \_\_\_\_\_ (for Illumina)

16. If you found that Illumina infringes any claim of the ‘243 patent, state separately for each claim the specific Illumina products and services you find to infringe:

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**Invalidity and Unenforceability of the ‘243 Patent**

17. Has Illumina proven by clear and convincing evidence that any of the following art invalidates the following claims of the ‘243 patent as anticipated?

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

[Specify art]

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

18. Has Illumina proven by clear and convincing evidence that any of the following claims of the '243 patent are invalid as obvious?

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

19. Has Illumina proven by clear and convincing evidence that any of the following claims of the '243 patent are invalid for lack of an adequate written description?

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

20. Has Illumina proven by clear and convincing evidence that any of the following claims of the '243 patent are invalid for lack of enablement?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

21. Has Illumina proven by clear and convincing evidence that any of the following claims of the '243 patent are invalid as indefinite?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

22. Has Illumina proven by clear and convincing evidence that the '243 patent is unenforceable for inequitable conduct?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**U.S. PATENT NO. 6,355,432 (“THE ‘432 PATENT”)**

**Infringement of the ‘432 Patent**

23. Has Affymetrix proven by a preponderance of the evidence that Illumina has literally infringed any of the following claims of the ‘432 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

24. Has Affymetrix proven by a preponderance of the evidence that Illumina has infringed any of the following claims of the ‘432 patent under the doctrine of equivalents?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

25. Has Affymetrix proven by a preponderance of the evidence that Illumina has contributorily infringed any of the following claims of the ‘432 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

26. Has Affymetrix proven by a preponderance of the evidence that Illumina has induced infringement of any of the following claims of the ‘432 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

27. If you found that Illumina infringes any claim of the ‘432 patent, state separately for each claim the specific Illumina products and services you find to infringe:

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**Invalidity and Unenforceability of the ‘432 Patent**

28. Has Illumina proven by clear and convincing evidence that any of the following claims of the ‘432 patent are invalid as anticipated?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

29. Has Illumina proven by clear and convincing evidence that any of the following claims of the ‘432 patent are invalid as obvious?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

30. Has Illumina proven by clear and convincing evidence that any of the following claims of the '432 patent are invalid for lack of an adequate written description?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

31. Has Illumina proven by clear and convincing evidence that any of the following claims of the '432 patent are invalid for lack of enablement?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

32. Has Illumina proven by clear and convincing evidence that any of the following claims of the '432 patent are invalid as indefinite?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

33. Has Illumina proven by clear and convincing evidence that the '432 patent is unenforceable for inequitable conduct?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**U.S. PATENT NO. 6,399,365 (“THE ‘365 PATENT”)**

**Infringement of the ‘365 Patent**

34. Has Affymetrix proven by a preponderance of the evidence that Illumina has literally infringed any of the following claims of the ‘365 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

35. Has Affymetrix proven by a preponderance of the evidence that Illumina has infringed any of the following claims of the ‘365 patent under the doctrine of equivalents?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

36. Has Affymetrix proven by a preponderance of the evidence that Illumina has contributorily infringed any of the following claims of the ‘365 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

37. Has Affymetrix proven by a preponderance of the evidence that Illumina has induced infringement of any of the following claims of the ‘365 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

38. If you found that Illumina infringes any claim of the ‘365 patent, state separately for each claim the specific Illumina products and services you find to infringe:

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**Invalidity and Unenforceability of the ‘365 Patent**

39. Has Illumina proven by clear and convincing evidence that any of the following claims of the ‘365 patent are invalid as anticipated?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

40. Has Illumina proven by clear and convincing evidence that any of the following claims of the ‘365 patent are invalid as obvious?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)



[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

41. Has Illumina proven by clear and convincing evidence that any of the following claims of the '365 patent are invalid for lack of an adequate written description?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

42. Has Illumina proven by clear and convincing evidence that any of the following claims of the '365 patent are invalid for lack of enablement?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

43. Has Illumina proven by clear and convincing evidence that any of the following claims of the '365 patent are invalid as indefinite?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

44. Has Illumina proven by clear and convincing evidence that the '365 patent is unenforceable for inequitable conduct?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**U.S. PATENT NO. 5,545,531 ("THE '531 PATENT")**

**Infringement of the '531 Patent**

45. Has Affymetrix proven by a preponderance of the evidence that Illumina has literally infringed any of the following claims of the '531 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

46. Has Affymetrix proven by a preponderance of the evidence that Illumina has infringed any of the following claims of the '531 patent under the doctrine of equivalents?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

47. Has Affymetrix proven by a preponderance of the evidence that Illumina has contributorily infringed any of the following claims of the '531 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

48. Has Affymetrix proven by a preponderance of the evidence that Illumina has induced infringement of any of the following claims of the '531 patent?

Claim Y Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

49. If you found that Illumina infringes any claim of the '531 patent, state separately for each claim the specific Illumina products and services you find to infringe:

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**Invalidity and Unenforceability of the '531 Patent**

50. Has Illumina proven by clear and convincing evidence that any of the following claims of the '531 patent are invalid as anticipated?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

51. Has Illumina proven by clear and convincing evidence that any of the following claims of the '531 patent are invalid as obvious?

[Specify art]:

Claim Y Yes \_\_\_\_\_ (for Illumina) No \_\_\_\_\_ (for Affymetrix)

[Specify art]:

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

52. Has Illumina proven by clear and convincing evidence that any of the following claims of the '531 patent are invalid for lack of an adequate written description?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

53. Has Illumina proven by clear and convincing evidence that any of the following claims of the '531 patent are invalid for lack of enablement?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

54. Has Illumina proven by clear and convincing evidence that any of the following claims of the '531 patent are invalid as indefinite?

Claim Y      Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

55. Has Illumina proven by clear and convincing evidence that the '531 patent is unenforceable for inequitable conduct?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**DAMAGES**

56. If you have found that Illumina has infringed at least one valid and enforceable claim from any of the asserted patents, has Affymetrix proven by a preponderance of the evidence that it is entitled to lost profits damages, and if so, for which Illumina products and services is Affymetrix entitled to lost profit damages?

Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

Illumina products/services: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

57. If you answered "Yes" to the above question, what amount of lost profits has Affymetrix proven by a preponderance of the evidence that it is entitled to?

Amount \$ \_\_\_\_\_

58. For each infringing Illumina product/service that Affymetrix has not sought lost profits damages for or for which you conclude that Affymetrix is not entitled to lost profits damages, specify the reasonable royalty rate and total infringing sales volume that Affymetrix has proven by a preponderance of the evidence that it is entitled to.

Illumina product/service: \_\_\_\_\_

Royalty rate: \_\_\_\_\_%

Infringing sales volume: \$ \_\_\_\_\_

Illumina product/service: \_\_\_\_\_

Royalty rate: \_\_\_\_\_%

Infringing sales volume: \$ \_\_\_\_\_

Illumina product/service: \_\_\_\_\_

Royalty rate: \_\_\_\_\_%

Infringing sales volume: \$ \_\_\_\_\_

**WILLFUL INFRINGEMENT**

59. If you found that Illumina has infringed a valid and enforceable claim of the asserted patents, has Affymetrix proven by clear and convincing evidence that Illumina's infringement was willful?

Yes \_\_\_\_\_ (for Affymetrix) No \_\_\_\_\_ (for Illumina)

**UNFAIR COMPETITION**

60. Has Illumina proven by a preponderance of the evidence that Affymetrix has engaged in conduct that is fraudulent, constitutes unfair business practices and/or is forbidden by law?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

**TORTIOUS INTERFERENCE**

61. Has Illumina proven by a preponderance of the evidence that Affymetrix intentionally interfered with a contract between Illumina and another entity?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

62. Has Illumina proven by a preponderance of the evidence that Affymetrix intentionally interfered with an economic relationship between Illumina and another entity that probably would have resulted in an economic benefit to Illumina?

Yes \_\_\_\_\_ (for Illumina)      No \_\_\_\_\_ (for Affymetrix)

63. If you answered “Yes” to either Question 61 or 62, what amount of compensatory damages has Illumina proven by a preponderance of the evidence that it is entitled to?

Amount      \$\_\_\_\_\_

64. If you answered “Yes” to either Question 61 or 62, what amount of punitive damages has Illumina proven by clear and convincing evidence that it is entitled to?

Amount      \$\_\_\_\_\_

You must each sign this Verdict Form:

Dated: \_\_\_\_\_

\_\_\_\_\_(foreperson)

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